No. 97-14

Supreme Court, U.S.
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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF MICHIGAN, *et al.*,
*Petitioners,*
v.
UNITED STATES OF AMERICA,
*Respondent,*
and
SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN,
*Intervenor-Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF FOR LEWIS COUNTY, IDAHO; MAHNOMEN COUNTY, MINNESOTA; LAKE COUNTY, MONTANA; LYMAN COUNTY AND TODD COUNTY, SOUTH DAKOTA; DUCHESNE COUNTY AND UINTAH COUNTY, UTAH; *AMICI CURIAE*, IN SUPPORT OF PETITIONERS, STATE OF MICHIGAN, *ET AL.*

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> Thus, if the Court agrees with the position of *either* party in this case, its legal ruling would be *dispositive* of this and other *pending* and *future cases*, and therefore would *obviate the need for potentially protracted and complex litigation* regarding the impact of real estate taxes on a case-by-case basis . . . we urge the Court to grant review now . . . and thereby to resolve a question of recurring importance on Indian reservations.

Brief for the United States as *Amicus Curiae* at 8, *Yakima County v. Yakima Indian Nation*, 502 U.S. 251 (1992) (Nos. 90-408, 90-577) (emphasis added).

By Order of January 7, 1991, this Court invited the Solicitor General to file a brief expressing the views of the United States in *Yakima County v. Yakima Indian Nation*, 502 U.S. 251 (1992). In response, the United States urged this Court to grant review for the broad policy reasons noted in the above quotation.[2] After this Court granted the petition, the United States, of course, sup-

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[1] The text of this *amici curiae* brief of the Counties is submitted in both *Leech Lake Band of Chippewa Indians v. Cass Co., Minnesota*, 108 F.3d 820 (8th Cir. 1997) *petition for cert. filed* (U.S. July 8, 1997) (No. 97-174) and in *United States v. Michigan*, 106 F.3d 130 (6th Cir. 1997) *petition for cert. filed* (U.S. June 30, 1997) No. 97-14). In both instances, the opinions of the district courts more accurately reflect the views expressed in *Yakima County v. Yakima Indian Nation*, 502 U.S. 251 (1992). *United States v. Michigan*, 882 F. Supp. 659 (E.D. Mich. 1995), *Leech Lake Band of Chippewa Indians v. Cass Co., Minn.*, 908 F. Supp. 689 (D. Minn. 1995).

[2] Earlier, the United States repeatedly told the Ninth Circuit Court of Appeals the same thing:

> The issue is important.—The issue is of *great importance* to Indians on reservations *throughout* the United States . . . applies to the *vast majority* of Indian reservations in the United States. . . The *broad importance* of the decision to reservation Indians. . . .

Memorandum for the United States as *Amicus Curiae* in Support of Petition for Rehearing and Suggestion for Rehearing *En Banc* at 1, 2, *Yakima*, 960 F.2d 793 (No. 88-3926) (emphasis added).

ported the position of the Indian tribes and, on the merits, their views were squarely rejected.

Contrary to the express representation to this Court, the United States then proceeded, as a party or as *amicus curiae* in other cases across the country, to continue to support additional litigation of this kind. In these cases, the United States maintained that *Yakima* should be *narrowly* construed and *severely* restricted in application. As a result, the concerns that prompted the filing of the *amici curiae* brief by the Counties in the *Yakima* case have only been exacerbated.

> The tax records in county court houses are being rifled. Since 1987, tribal governments across the country, with the assistance and encouragement of the United States, have challenged the validity of county ad valorem taxes on Indian fee lands . . . As a result, members of tribes have refused to pay their taxes . . . tax abatement petitions have been filed . . . individual lawsuits have been filed against counties in State courts . . . tribal lawsuits have been filed against counties in federal courts . . . and even worse, the United States, just a year ago, after the decision below, targeted one *Amici* county and sued the county and the State in federal court in the name of the United States. . . . (Federal complaint with attachments; one inch thick, burdensome interrogatories and requests for production of documents). Apart from the fact that county governments can ill afford to squander scarce resources on senseless litigation, the issue here threatens the very core of county fiscal integrity.

Brief for La Plata County, Colorado, et al. as *Amicus Curiae* in Support of Petitioners at 1, *Yakima* (Nos. 90-408, 90-577).

As in *Yakima*, the Counties joining in this Brief all contain areas that at one time were established as Indian reservations. They are representative of many other counties similarly situated throughout the United States. As this Court has often noted, fee lands are scattered through-

out the counties, some of which are owned by Indians and Indian tribes. The history of each area is, of course, as varied and diverse as federal Indian policy—with one exception. Historically, every county has routinely taxed these fee lands and this practice has been the accepted rule for decades.

To be sure, the extent of Indian fee ownership varies from reservation to reservation and reflects radically different fact situations. Locally, tribal enrollment lists are not ordinarily available to county governments and even these lists do not include non-member Indians, who also own fee property. So we are not certain of the total sum involved. One thing, however, is certain. The amount is substantial—because these counties also contain large areas of other lands that are non-taxable and held in trust by the United States for Indians and Indian tribes. For example, in one county, approximately 60 percent of the entire county is held in trust by the United States for the tribe or its members or other Indians. Of the taxable land, Indian fee land on paper roughly constitutes more than 15 percent of the seven hundred and fifty thousand ($750,000) to eight hundred and fifty thousand ($850,000) dollars of total taxes collected by the county per year in recent years. In another county, the same figure represents roughly 8 percent of the total taxes collected. In other counties the percentage could be more and in some counties it is undoubtedly less. But the exact percentage is beside the point. Whatever the amount, county government in these areas is not some new and novel experience. It has been there for decades pursuant to Congressional Policy. That Congressional Policy has authorized the taxes here—and not simply on a restricted case by case basis, as two out of the three courts of appeals have indicated.

The issue in these cases represents a fundamental and most basic concept in federal Indian law that has been resolved and relied on for decades. For this additional reason, the Counties respectfully submit that this Court grant the petitions for writs of certiorari in both *Leech*

*Lake Band of Chippewa Indians v. Cass Co., Minnesota,* 108 F.3d 820 (8th Cir. 1997) *petition for cert. filed* (U.S. July 8, 1997) (No. 97-174) and in *United States v. Michigan,* 106 F.3d 130 (6th Cir. 1997) *petition for cert. filed* (U.S. June 30, 1997) (No. 97-14).

## REASONS FOR GRANTING THE PETITIONS

### I. THE OPINIONS OF THE COURTS OF APPEALS ARE CONTRARY TO A TRADITION OF TAXATION AND CONFLICT IN PRINCIPLE WITH THE RELEVANT DECISIONS OF THIS COURT.

The Counties fully support the reasons for granting the petitions set forth in the petitions and in the brief of supporting *amici curiae* States. The Counties recognize that the primary considerations governing review will focus on the conflict among the circuits and the conflict with the decision of this Court in *Yakima.* The Counties further submit that the decisions of the panels conflict substantially with other related decisions of this Court and a tradition of taxation. This brief will focus on that tradition and highlight those decisions.

#### A. Introduction.

In order to place the taxation of fee lands issue in historical context, one need first refer to the fact that until 1989, nearly everyone, including the United States, acted upon the recognition that such taxes were clearly permissible. The Counties have appended the opinion of the Associate Solicitor, Division of Indian Affairs, of the Department of the Interior Memorandum dated March 22, 1979. Co. App. 1a-3a.

In fact, this is the reason that the decisions below do not cite any other opinions that have reached the tax exempt conclusion. There are none. These decisions represent the first time any Courts of Appeals have ever held that ordinary fee lands owned by Indian tribes or their members are not taxable—not an insignificant point.

Again, the United States is, in large part, responsible for this radical departure from tradition and precedent.

For this reason, a few preliminary observations regarding the arguments the United States submitted below are in order. First, although the United States flaunts its "expertise in Indian law matters" (Brief for the United States at 1, *Leech Lake Band of Chippewa Indians v. Cass Co., Minn.*, 108 F.3d 820 (8th Cir. 1997) (No. 95-4263)), the United States never acknowledges that:

1. Most of the arguments relied upon by the United States have been just slightly revised from those submitted by the United States in *Yakima* and rejected by this Court.

2. No court of appeals had ever adopted the argument of the United States.

3. A century of agency opinions and congressional action detract from the argument of the United States.

4. A 1902 Congressional Resolution and a 1923 Act of Congress were passed to extend the scope of the General Allotment Act of 1887, 24 Stat. 388 (*see generally Stevens v. C. I. R.*, 452 F.2d 741 (9th Cir. 1971):

> Insofar as not otherwise specially provided, all allotments in severalty to Indians, outside of the Indian Territory, shall be made in conformity to the provisions of the Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and the other general Acts amendatory thereof or supplemental thereto, and shall be subject to all the restrictions and carry all the privileges incident to allotments made under said Act and other general Acts amendatory thereof or supplemental thereto.

Joint Resolution of June 19, 1902, 32 Stat. 744.

> That unless otherwise specifically provided, the provisions of the Act of February 8, 1887 (Twenty-fourth Statutes at Large, page 388), as amended, be, and they are hereby, extended to all lands heretofore

> purchased or which may hereafter be purchased by authority of Congress for the use or benefit of any individual or band or tribe of Indians.

Act of February 14, 1923, 42 Stat. 1246, 25 U.S.C. § 335.

5. Provisions in the Indian Reorganization Act of 1934, 48 Stat. 984, and related regulations at 25 C.F.R. 151 detract from the arguments of the United States.

6. The original edition of Felix Cohen's Handbook of Federal Indian Law at 258-261, undermines the arguments of the United States (this segment also undermines the Non-Intercourse Act argument that the United States again submits).

7. The 1982 Handbook of Federal Indian Law supports the United States, but that those arguments were submitted by the United States and rejected in *Yakima*.[3]

In other instances, the argument of the United States is seriously misleading. For example, the following "omission" assertion appears at page 29 in the brief the United States submitted in *Leech Lake*:

> *Yakima* did not, however, address the immunity enjoyed by tribally-owned land. This *omission* likely stems from the Court's primary focus on individual Indian ownership of fee lands in that case.

Brief for the United States at 19, *Leech Lake*, 108 F.3d 820 (No. 95-4263) (emphasis added).

The United States should know better. The "Question Presented" in the Brief for the United States in *Yakima* was carefully drafted in this respect:

> Whether Yakima County may impose its ad valorem tax on real property situated within the boundaries of the Yakima Indian Reservation that is owned in

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[3] The original Cohen text (and the subsequent revisions) have been viewed by some as tribal advocacy works. *See* Conference of Western Attorneys General. American Indian Law Deskbook at xiii-xv (1993).

> fee by the *Yakima Nation or individual members* of the Yakima Nation.

Brief for the Unied States as Amicus Curiae at I, *Yakima*, 502 U.S. 251 (Nos. 90-408, 90-577) (emphasis added).

Further, tribal ownership was discussed throughout the briefs and noted on four separate occasions in the text of the *Yakima* opinion. *Yakima*, 502 U.S. at 256, 264, n.4. *See also* Transcript of Oral Argument at 4, 18 and 28, *Yakima* (No. 90-408; 90-577).

Finally, at other times, the United States inadvertently undermines the position of the Leech Lake Band. For example, in this instance, the Leech Lake Band would like this Court to think that the Nelson Act was unusual and atypical in every respect. Respondent's Brief in Opposition, *Leech Lake*, 108 F.3d 820 (No. 95-4263). On the other hand, the United States routinely recognizes that:

> The Nelson Act, ch. 24, 25 Stat. 642, was one of a series of allotment acts passed by Congress after the passage of the General Allotment Act of 1887, 24 Stat. 388.

Brief for the United States at 2, *Leech Lake*, 108 F.3d 820 (No. 95-4263).

In this case, the United States is undoubtedly correct. For example, *see* the Great Sioux Act of 1889, 25 Stat. 896, where the General Allotment Act was, like the Nelson Act, simply tailored to the specific situation existing in the State at issue.

In short, the United States recognized early on in the *Yakima* litigation that the General Allotment Act was a statute of general applicability, amended on several occasions to further reflect its universal application, and in some instances, as in Minnesota, specifically incorporated by express reference in the text of related legislation dealing with allotments required by previous legislative formats. Accordingly, *Yakima* was thoroughly briefed on both sides in recognition of this fundamental understanding, with the United States (and 25 different tribes from

across the country) submitting dozens of arguments in their briefs to preclude the taxation of fee lands. As *Yakima* attests, this Court, with one dissent, rejected these ad valorem tax exemption claims.

While it is not necessary for any Opinion to address each and every argument that is not deemed persuasive, the assumption that this Court in *Yakima* did not address or consider all arguments of substance would be especially unwarranted in this instance. The United States and others filed *exhaustive* briefs detailing every conceivable argument in support of a tribal tax exemption on fee lands (including the *Goudy v. Meath*, 203 U.S. 146 (1906) has been overruled argument, the *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) argument, the 1934 Indian Reorganization Act argument, the 18 U.S.C. § 1151 Indian Country argument, *and* the 25 U.S.C. § 177 argument[4])—all of which were rejected. In *Yakima*, as in other recent cases, the position of the United States was simply tailored to support the arguments of Indian tribes. And this is the perspective from which the opinions of the courts of appeals that have adopted those arguments in these cases should be viewed.

### B. The General Allotment Act Has Been Consistently Construed to Generally Authorize the Taxation of Fee Patent Land.

As we noted in *Yakima*, although this Court generally discussed the General Allotment Act in *Draper v. United States*, 140 U.S. 240 (1891), it was not until 1903 that a tax related issue reached this Court in *United States v. Rickert*, 188 U.S. 432 (1903). There, the United States correctly headed its argument with the proposition that "the lands of the Indian allottees are not taxable under

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[4] Immunity of Indian lands from state taxation and control is at the very core of federal Indian policy. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1983); 25 U.S.C. § 177. Brief for the United States as *Amicus Curiae* at 12, *Yakima*. *See also Larkin v. Paugh*, 276 U.S. 431, 433-434 (1928).

the authority of the State *during* the trust period" and concluded that improvements were similarly "exempt from taxation *during* the trust period that the land is so exempt, such improvements being in legal contemplation land." Brief for the United States at 15, 42, *Rickert* (No. 216) (emphasis added). The *Rickert* opinion reflects this representation:

> [N]o power in the State of South Dakota, for state or municipal purposes, to assess and tax the lands in question *until* at least the fee was conveyed to the Indians. . . . *While* the title to the land remained in the United States, the permanent improvements, could no more be sold for local taxes than could the land to which they belonged.

*Rickert,* 188 U.S. at 437, 442 (emphasis added).

A few years later, in *Goudy v. Meath,* 203 U.S. 146 (1906), a related issue was generally discussed and decisively resolved. The *Goudy* alienation argument, addressed in detail by others, need not be repeated here.

In *United States v. Nice,* 241 U.S. 591 (1916), a case involving a federal prosecution for the sale of liquor to a tribal member with a 1902 trust patent, the United States only indirectly touched on this aspect of the General Allotment Act and the status of the individual:

> [C]ongress by this very act of 1887 expressly retained control over the allottee Indian's land *by restrictions of alienation and trusteeship*. . . . The State, having *no power to tax* these Indian [trust] allotments, had no particular interest in the Indian's welfare. . . . [I]t was well established that State laws relating to *taxation* of his [trust] property did not apply. . . .

Brief of the United States at 26, 21, 12, *Nice* (No. 681) (emphasis added).

The Court in *Nice* referred to this aspect of the General Allotment Act when it described the holding in *Rickert*:

> The act of 1887 came under consideration in *United States v. Rickert*, 188 U.S. 432, a case involving the power of the State of South Dakota to tax allottees under that act, according to the laws of the State, upon their allotments, the permanent improvements thereon and the horses, cattle and the other personal property issued to them by the United States and used on their [trust] allotments, and this court, after reviewing the provisions of the act and saying, p. 437, "These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition," held that the State was *without power to tax* the [trust] *lands* and other property, because the same were being held and used in carrying out a policy of the Government. . . .

*Nice*, 241 U.S. at 600-601 (emphasis added).

Two years later, the United States was more succinct when it argued another tax exemption issue in *United States v. McCurdy*, 246 U.S. 263 (1918):

> Partial emancipation from the Federal guardianship, accompanied by restricted ownership of land *for a limited period*, as a method of educating and preparing the Indians for the duties of civilized life, was adopted by Congress at an early date and has become a settled national policy. . . . In *United States v. Rickert*, 188 U.S. 432, it was decided that *trust* allotments and personal property issued to Indian allottees could not be taxed by a State because this would be "to tax an instrumentality employed by the United States for the benefit and control of this dependent race. . . ."

Brief for the United States at 9, 11, 12. *McCurdy* (No. 685) (emphasis added).

In *McCurdy*, the United States argued that land purchased with trust funds for an Osage Indian, as evidenced by a restrictive deed, should not be taxable by the State of Oklahoma. The *McCurdy* Opinion rejected the tax exemption argument of the United States in no uncertain

terms. At the same time, the Court clearly restated the basis of *Rickert*:

> There is also a *clear distinction* between the present case and those like *United States v. Rickert*, 188 U.S. 432, 23 Sup.Ct. 478, 47 L.Ed. 532, where it was sought to tax property, *the legal title of which was in the United States* and which was held by it for the benefit of Indians.

*McCurdy*, 246 U.S. at 272 (emphasis added). Nothing in *United States v. Nice*, was argued or cited by the United States and *Nice* did not figure in the Opinion of the Court in *McCurdy*, and correctly so.

A case more directly on point reached this Court in 1939. In *Board of Comm'rs of Jackson County, Kansas v. United States*, 308 U.S. 343 (1939), the United States equated a General Allotment Act trust patent with the exemption from taxation:

> The *trust patents* issued in fulfillment of that treaty and pursuant to the General Allotment Act of 1887 [24 Stat. 388 (sec. 5), as amended by Act of May 8, 1906, c. 2348, 34 Stat. 182] bound by the United States to convey the land "free of all charge or incumbrance whatever" at the end of the *trust period. Such* [trust] *patents* have uniformly been construed to grant to the Indians a broad exemption from all forms of taxation effecting the land.

Brief for the United States at 6-7, *Board of Comm'rs of Jackson County, Kansas v. United States*, 308 U.S. 343 (1939) (No. 1728) (emphasis added).

Although *Board of Comm'rs of Jackson County, Kansas* only involved the question of whether interest should be awarded when taxes were erroneously assessed, the opinion mentions the General Allotment Act and reflects the understanding of that time:

> The land which gave rise to this controversy, situated in Jackson County, Kansas, was [trust] patented under the General Allotment Act of February 8,

> 1887, 24 Stat. 388, 25 U.S.C. § 348. In pursuance of this Act, the United States agreed to hold the land for twenty-five years under the restrictions of the 1861 Treaty, subject to extension at the President's discretion. . . .
>
> In this legislative setting, the Secretary of the Interior in 1918, over the objection of M-Ko-Quah-Wah, cancelled her outstanding *trust patent* and in its place issued a *fee simple patent.* This was duly recorded in the Registry of Deeds for Jackson County. *In consequence* Jackson County in 1919 began to subject the land to its *regular property taxes.* It continued to do so as long as this *fee simple patent* was left undisturbed by the United States. . . . Jackson County in all innocence acted *in reliance on a fee patent* given under the hand of the President of the United States. . . . Here is a long, unexcused delay in the assertion of a right for which Jackson County should not be penalized. By virtue of the *most authoritative semblance of legitimacy under national law,* the land of M-Ko-Quah-Wah and the lands of other Indians had become part of the economy of Jackson County. For eight years after Congress had directed attention to the problem, those specially entrusted with the intricacies of Indian law did not call Jackson County's action into question. Whatever may be her unfortunate duty to restore the taxes which she had *every practical justification* for collecting at the time, no claim of fairness calls upon her also to pay interest for the use of the money which she *could not* have known was not *properly* hers.

*Board of Comm'rs,* 308 U.S. at 348-349, 352-353 (emphasis added).

In 1943, in a most instructive case that involved a special modification of the twenty-five year trust limitation of the General Allotment Act, the United States recounted to this Court that the General Allotment Act "has been *uniformly construed* as conferring upon the Indians a vested 25-year tax exemption. . . ." and the United

States conceded that subsequent to that period, the land was legally taxable. Brief for the United States at 17, 43, *Mahnomen County v. United States,* 319 U.S. 474 (1943) (No. 684) (emphasis added). The *Mahnomen* decision reflects this important concession in no uncertain terms:

> It is *conceded* that any limitation on the County's power to tax *expired* in 1928 with the termination of the twenty-five year trust described below.

*Mahnomen,* 319 U.S. at 475 (emphasis added).

Most of the important early cases of this Court are discussed in detail in the Brief for the United States, *Mahnomen,* No. 684. Although *Mahnomen* is a Minnesota case decided by this Court, and although it specifically deals with the Nelson Act and the taxation of real property owned by tribal members, the United States neglected to cite or discuss it in the court of appeals. Similarly, the court of appeals mentioned *Mahnomen* only in passing, as a case that simply "suggested that the land might only be free from taxation during the original trust period," and then cited the dissent for that proposition. *Leech Lake Band of Chippewa Indians v. Cass County, Minnesota,* 108 F.3d 820, 823 (8th Cir. 1997), Pet. App. 6. In this respect, the decision of the panel majority is in further conflict with a decision of this Court, as a thorough reading of *Mahnomen* attests.[5]

In 1952, the United States in *Bailess v. Paukune,* 344 U.S. 171 (1952), generally described two instances where it deemed taxation to be "forbidden by the General Allotment Act":

> [W]hether *under trust patents* or *under fee patents with restrictions* upon alienation. . . .

Brief for the United States at 2, *Bailess v. Paukune* (No. 242) (emphasis added).

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[5] *See also Nichols v. Rysavy,* 809 F.2d 1317 (8th Cir. 1987), *cert. denied,* 484 U.S. 848 (1987), and *County of Thurston v. Andrus,* 586 F.2d 1212 (8th Cir. 1978), *cert. denied,* 441 U.S. 952 (1979).

*Bailess* involved the taxation of land of an allegedly Indian widow, who in due course was to receive a "fee patent" for the interest she inherited from her husband in a trust allotment. The Court concluded her interest was taxable if she was a non-Indian and in the process noted:

> This allotment was made under the General Allotment Act of February 8, 1887, 24 Stat. 388, 389. . . . No fee patent to the land has issued to *Paukune,* to his widow, or to the son. The trust period of twenty-five years has from time to time been extended. In other words, the United States still holds the land in trust for *Paukune* and his heirs. . . .

*Bailess,* 344 U.S. at 171-172 (emphasis added).

In 1956, in an income tax case that involved the General Allotment Act, as amended by the Burke Act of 1906, 34 Stat. 182, the United States succinctly stated that:

> [T]his provision was undoubtedly intended *to make it clear* that Indian lands transferred *in fee* to the Indians would *thereafter* be subject to state and local taxation. . . .

Brief for the Petitioner at 13 n.4, *Squire v. Capoeman,* 351 U.S. 1 (1956) (No. 134) (emphasis added). The opinion of the Court accepted the basic premise of the argument:

> The Government argues that this amendment was directed solely at permitting state and local taxation *after a transfer in fee,* but there is no indication in the legislative history of the amendment that it was to be so limited. . . . The literal language of the proviso evinces a congressional intent to subject an Indian allotment to *all taxes only after a patent in fee* is issued to the allottee.

*Squire,* 351 U.S. at 7-8 (emphasis added).

In 1973, in *United States v. Mason,* 412 U.S. 391 (1973), the United States noted that the Court in *Squire*:

> [R]elied on language in an amendment to the General Allotment Act providing for *taxation of the land after the allottee receives a patent in fee* . . . [and] held that an amendment to the General Allotment Act created a tax exemption by implication, and that it required the return of the trust property without encumbrances at the end of the trust period . . . *and provided for taxation after the termination of the trust.*

Brief for the United States at 9-10, 17, *United States v. Mason*, 412 U.S. 391 (1973) (Nos. 72-654, 72-606) (emphasis added). The Court in *Mason* agreed:

> Moreover, the *Squire* decision rested heavily on the provision in the General Allotment Act providing for the removal of 'all restrictions as to sale, encumbrance, or taxation' *when Indian property is granted in fee. . . .*

*Mason*, 412 U.S. at 396 (emphasis added). Even Mr. Hobbs, arguing for the tribal respondents in oral argument, stated:

> The next thing that happens is that in 1906 Congress amends the General Allotment Act, and it says that—for the first time adds the idea that the trust period can end sooner than the 25 years intended if the Indian becomes competent sooner than that time. And it says that after he reaches the point of competency, the trust will end and he gets his land, and all restrictions as to alienation and *taxation are lifted.* This implies that Congress thought that the land was free of tax up to that point and well so. Over sixty years ago this Supreme Court, in 1903, had held that a restriction on alienation added up to a tax exemption. So, Congress assumed on very good authority in 1906 that the restriction on alienation was the equivalent of a tax exemption.

Tr. of Oral Argument at 38, *United States v. Mason*, 412 U.S. 391 (1978) (Nos. 72-654, 72-606) (emphasis added).

Most recently, in *United States v. Mitchell,* 445 U.S. 535 (1980), the United States reviewed the entire history of the General Allotment Act. Again, the United States told this Court the exemption to state taxation coincided with the trust period:

> The General Allotment Act . . . for the limited purposes of (a) restraining improvement alienation of the land by the allottees and (b) affording an immunity from state taxation for the period *during* which the legal title remained in the United States. . . .

Brief for the United States at 24, *Mitchell* (No. 81-1748) (emphasis added). In oral argument, Mr. Claiborne, arguing for the United States, said the same thing:

> That statute contemplated a scheme whereby the land of the reservaton would be divided among the Indians within 25 years, and in the *meantime,* the United States was simply to hold title in trust solely for the *purpose* of preventing state taxation, it being legal title in the United States and therefore exempt from state taxation.

Tr. of Oral Argument at 14, *United States v. Mitchell,* 445 U.S. 535 (1980) (No. 81-1748) (emphasis added). This Court agreed:

> [W]hen Congress enacted the General Allotment Act, it intended . . . to prevent alienation of the land and to ensure that allottees would be immune from state taxation.

*Mitchell,* 445 U.S. at 544. At the end of this conclusion, the Court quoted at length and added emphasis to the remarks of Representative Skinner, the sponsor in the House of Representatives: ". . . 'land *is made inalienable and non-taxable for a sufficient length of time.*' . . ." *Mitchell,* 445 U.S. at 544, n.5 (emphasis as in original except for a sufficient length of time). In dissenting, Justice White described the holding of the Court in the same terms:

> The Court holds, however, that the 'trust' established by § 5 is not a trust as that term is commonly understood, and that Congress had no intention of imposing full fiduciary obligations on the United States. Congress' purposes, it is said, were narrower: to impose a restraint on alienation by Indian allottees while ensuring *immunity from state taxation during the period* of the restraint.

*Mitchell*, 445 U.S. at 546, 547 (White, J., dissenting) (emphasis added). It is significant that the arguments the United States submitted in *Mitchell* were presented subsequent to the decisions of this Court that the United States now advances to undermine the same position.

### C. All Related Opinions Reflect That The General Allotment Act Was Clearly Understood to Generally Authorize the Taxation of Fee Patent Land.

Immediately after the passage of the 1887 Act, the Secretary of the Interior requested and received an opinion from the Attorney General of the United States. Among other things, this opinion clearly ties the tax exemption to the twenty-five year trust period.

> I am also of the opinion that the allotment lands provided for in the act of 1887 are exempt from State or Territorial taxation upon the ground above stated with reference to the act of 1884, namely, that the lands covered by the act are held *by the United States for the period of twenty-five years in trust for the Indians,* such trust being an agency for the exercise of a Federal power, and therefore outside the province of State or Territorial authority.

19 Op. Atty. Gen. 161, 169 (1888) (emphasis added). Later, opinions from the Department of the Interior reinforced this accepted construction. 30 L.D. 258, 266-267 (1900), 50 L.D. 591 (1924), 53 L.D. 107 (1930), 53 L.D. 133 (1930). With specific reference to the original Nez Perce Indian Reservation, in 1930 the Interior Solicitor characterized the issue as follows:

> [T]he subsequent enactment of the general allotment act of 1887, embracing within its scope reservations such as the Nez Perce, created by treaty stipulation, and the making of allotments thereunder to the Indians with their consent as manifested, not only by the selections made by them, but by the subsequent agreement of 1894, make it plain that the provisions of the original treaty of 1863 relied upon as creating the tax exemption here claimed, were superseded by the provisions of the general allotment act.
>
> The rights of the Nez Perce Indians with respect to the lands allotted to them, are thus determined by the general allotment act of 1887 and as that act contains no provision exempting the allotted lands from taxation after issuance of fee simple patents upon expiration of the trust period, I am clearly of the opinion that such lands thereupon become subject to the taxing power of the State.

53 L.D. 133, 136 (1930), Co. App. 6a.

This construction of the 1887 Act is repeatedly reflected in every related opinion of the Department of the Interior thereafter until 1989. On April 21, 1989, the 1979 opinion that restated this position was simply rescinded. After citing several cases decided by this Court in the 1970s, an Associate Solicitor of the Department of the Interior reasoned that:

> [L]anguage in some of those decisions suggests the state is on weaker ground when it attempts to tax Indian ownership of land. . . .

Memorandum at 1, BIA. IA. 0943, April 21, 1989. The decision of this Court in *Yakima* authoritatively resolved that question.

## CONCLUSION

Predictably, the United States will advance several reasons for this Court to wait for "another day" to review the questions presented in the Petitions. Nevertheless, fo the foregoing reasons, and those stated in the Petitions and supporting *amici* brief of the States, the Petitions for Writs of Certiorari should be granted.

Respectfully submitted,

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August 29, 1997

# APPENDIX

## APPENDIX

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

Mar. 22, 1979

Memorandum

To: Field Solicitor, Twin Cities

From: Associate Solicitor, Division of Indian Affairs

Subject: Taxability of Reservation Lands Owned by Indians in Fee

I am unable to agree with the position taken in the research paper enclosed with your memorandum of January 25, *i.e.*, that Indian-owned fee land within reservations is exempt from state and local real property taxation.

The research paper relies primarily on the principle of federal preemption of state power to tax, correctly stating that this method of analysis is the preferred one where state taxation questions are at issue. However, a fundamental aspect of the principle that Congress may preempt state taxation of Indians is that Congress may also give permission to the states to tax Indians or Indian property. Such permission has been given, with respect to real property taxation of fee lands, in 25 U.S.C. § 349.

In *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), the Supreme Court held that Indians within reservation boundaries are immune from state personal property taxes, vendor license fees, and cigarette sales taxes. In that case, the Court considered the general language in the part of 25 U.S.C. § 349 which provided that, upon the issuance of fee patents, allottees would become subject to *all* civil and criminal laws of the state. It found that this part of § 349 has been modified by or

at least requires interpretation in light of later legislation dealing with jurisdictional matters. This later legislation, the Court said, manifests Congressional intent to eschew checkerboard jurisdiction. Thus, the taxes at issue in *Moe*, which are civil laws of the state and fall within the scope of the first part of § 349, are inapplicable to Indians anywhere within reservation boundaries, regardless of the title status of land.

However, the same conclusion may not automatically be reached with respect to real property taxes, because those taxes are specifically addressed in a later part of § 349. The first proviso to that section provides in part that:

> "[T]he Secretary . . . may . . . cause to be issued to [an] allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of such land shall be removed. . . ."

The Supreme Court did not address this provision in *Moe*. In light of the specific taxing permission contained in the proviso, the Court's holding in *Moe* may not be extended to real property taxes, in the absence, at least, of a showing that the conditions existing with respect to those taxes are the same as those which led the Court to its conclusion in *Moe*, *i.e*, that subsequent legislation has modified this part of § 349.

I do not believe it can be said that the taxing permission in this proviso has been modified by later legislation. Rather than legislating in a manner inconsistent with it, Congress, since the General Allotment Act, clearly appears to have acted upon the assumption that land owned by Indians in fee is taxable. Subsequent legislation relating to land acquisition or sale, where taxation is mentioned, generally equates tax-exemption with trust or restricted status. *E.g.*, 25 U.S.C. 409a, 412a, 465, 501, 403-1; Act of July 24, 1956, 70 Stat. 626, § 3.

Section 349 applies, by its terms, to patents in fee issued for allotments. The Act of February 14, 1923, 25 U.S.C.

§ 335, extended the provisions of the General Allotment Act, including 25 U.S.C. § 349, to "all lands heretofore purchased or which may be purchased by authority of Congress for the use and benefit of any individual Indian or band or tribe of Indians." That statute has been construed to encompass lands purchased and taken in trust for individual Indians within the tax-exemption benefits of the General Allotment Act. *Stevens v. Comnr. of Internal Revenue*, 452 F. 2d 741 (9th Cir. 1971).

Likewise, I think the taxing permission in § 349 must be construed to apply to purchased land, certainly where land is purchased and taken in trust, and for which a patent in fee is later issued. Although it might conceivably be argued that land purchased in fee and not taken into trust does not fall within this permission, I think it is clear that the General Allotment Act and subsequent legislation, taken together, manifest Congressional understanding and intent that tax-exempt status of Indian land depend upon its being trust or restricted land.

Your § 2415 cases which depend upon a theory of nontaxability of fee land should be removed from your case list.

/s/ Thomas W. Fredericks
THOMAS W. FREDERICKS

## EXCERPTS OF DECISION OF DEPARTMENT OF THE INTERIOR, 53 I.D. 133 (1930) RE TAXATION OF NEZ PERCE INDIAN ALLOTMENTS AFTER EXPIRATION OF TRUST PERIOD

*Opinion June 30, 1930*

NEZ PERCE INDIAN LANDS—ALLOTMENT—TAXATION.

The provision in the treaty of June 9, 1863, concluded with the Nez Perce Indians, for the allotment of lands in Idaho to individuals of that tribe, was, by the stipulations of the later agreement of August 25, 1894, superseded by the general allotment act of February 8, 1887, and the tax exemption of the allotted lands created by the treaty was abrogated.

NEZ PERCE INDIAN LANDS—ALLOTMENT—PATENT—TAXATION.

Upon the issuance of fee simple patents following the expiration of the 25 year trust period provided for in the general allotment act, the lands alotted to members of the Nez Perce Tribe of Indians become subject to taxation by the State in the same manner as property belonging to other citizens. *Goudy* v. *Meath* (203 U. S. 146), and *Larkin* v. *Paugh* (170 U. S. 431).

FINNEY, *Solicitor:*

You [Secretary of the Interior] have requested my opinion as to whether the lands allotted to the members of the Nez Perce Tribe of Indians in Idaho become subject to taxation by the State upon the issuance of fee simple patents therefor, following expiration of the 25 year trust period provided for in the acts under which these Indians were allotted.

The Nez Perce Indians were allotted lands in severalty pursuant to the provisions of the general allotment act of

February 8, 1887 (24 Stat. 388), and for the lands so allotted the allottees received patents of the form and legal effect provided in section 5 of that act which reads—

> That upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. * * *

The United States, under the foregoing provision, retained the legal title, giving the allottee a paper or writing inaptly termed a patent (*United States* v. *Nice*, 241 U. S. 591, 595), showing that at a particular time in the future, unless it was extended by the President, the allottee or his heirs, as the case might be, would be entitled to a regular patent, conveying the fee discharged of the trust and free of all charge and incumbrance. The United States thus retained its hold upon the land for a period of 25 years and as much longer as the President in his discretion might determine. While the statute contains no express provision with respect to taxation of the land during or after the expiration of the trust period, the intent of Congress in that regard is plain. During the restricted or trust period, the land is held by the United States for the allottee or his heirs, as a part of the general policy of dealing with the Indians and is being administered as a governmental instrumentality. While so held and

administered, no power rests in the State to assess and tax the same until at least the fee is conveyed to the Indian. *United States* v. *Rickert* (188 U. S. 432). Upon issuance of the fee simple patent following expiration of the trust period, however, the title passes from the United States to the allottee. The jurisdiction and authority theretofore possessed by the Secretary of the Interior by reason of the prior trust and restriction come to an end (*Larkin* v. *Paugh*, 276 U. S. 431), and the allottee becomes invested with full power of alienation and as a necessary incident thereof, the lands become subject to taxation in the same manner as property belonging to other citizens. *Goudy* v. *Meath* (203 U. S. 146).

* * * *

Under the treaty of 1863, by which the Nez Perce Reservation was created, the United States agreed to reserve the land for a home and the sole use and occupancy of said tribe. So far as here material, the treaty provided that immediately after ratification thereof, the President should cause the boundaries of the reservation to be surveyed and established, after which the cultivable land should be surveyed into lots of 20 acres each and one such lot assigned to each member of the tribe over the age of 21 years, or the head of a family, who desired it "as a permanent home for such person," and set apart for the perpetual and exclusive use and benefit of himself and heirs. Then followed the provision reproduced above with respect to the taxability and alienability of the lands assigned. The residue of the land was to be held in common for pasturage for the sole use and benefit of the Indians, with the provision, however, for future assignments of land from time to time as members of the tribe might come upon the reservation and claim the privileges granted by the treaty. By an amendatory treaty of August 13, 1868, ratified February 24, 1869 (15 Stat. 693), provision was made, among others, for the removal of Indians residing outside the reservation to allotments within the

reservation, or upon certain conditions such Indians might be allowed to remain on the lands then occupied by them upon the same terms and conditions as those within the reservation.

Examination of the records of the Indian Office, however, discloses that no allotments were made to the Indians under the provisions of these earlier treaties, because the Indians, being dissatisfied with the small quantity of land to which each was entitled, had refused to take such allotments. Matters stood thus when the general allotment act of 1887 was passed, section 1 of which provided that in all cases where "any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or Executive order setting apart the same for their use," the President is authorized, whenever in his opinion any such reservation or part thereof is advantageous for agricultural or grazing purposes, to cause the same to be surveyed and to allot the lands in severalty to any Indian located thereon in the quantities therein specified. Acting upon authority of this statute, which embraced within its scope reservations created by treaty stipulation, such as the Nez Perce, the President, on April 13, 1889, issued directions for the making of allotments of land in severalty to the Indians of the Nez Perce Reservation under the provisions of the general allotment act. Pursuant thereto, a schedule of allotments, based upon selections made by the Indians, was approved by the Secretary of the Interior on March 19, 1895, and trust patents therefor duly isssued to the allottees in conformity with section 5 of the general allotment act, as aforesaid.

In the act of August 15, 1894 (28 Stat. 286, 326, 327, 330), making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with the various Indian Tribes, will be found an agreement between the Nez Perce Tribe of Indians and

the United States, from which it appears that in making that agreement the parties proceeded under authority of the act of 1887. By that agreement, the Indians ceded, sold, relinquished and conveyed to the United States all their claim, title and interest in and to certain unallotted lands within the reservation, except certain specified tracts which they retained. The parties stipulated that the lands so ceded should not be open for settlement until "*trust patents*" *for the allotted lands* [italics supplied] had been duly issued and recorded and the first payment made to the Indians. Article 7 stipulated that all allotments made to the members who have died since the same were made, or may die before the ratification of the agreement, shall be confirmed "*and trust patents issued in the names of such allottees respectively.*" [Italics supplied.] Article 2 provided for relinquishments by certain allottees, with provision for the issuance of a new patent "of the form and legal effect prescribed by the fifth section of the act of February 8, 1887 (Twenty-fourth Statutes three hundred and eighty-eight), for the new allotment and that portion of the old allotment surrendered." It is significant to note that the earlier treaties contained no provision for the issuance of trust patents and the stipulations in this later agreement for the issuance of such patents as provided for in the fifth section of the general allotment act, clearly show that it was the understanding of the parties that the provisions of the general allotment act controlled in the matter of allotments, and the agreement can, therefore, have no other effect than to confirm the action of the President in causing the allotments to be made thereunder.

The refusal of the Indians to take allotments under the earlier treaties of 1863 and 1869, the subsequent enactment of the general allotment act of 1887, embracing within its scope reservations such as the Nez Perce, created by treaty stipulation, and the making of allotments thereunder to the Indians with their consent as manifested, not

only by the selections made by them, but by the subsequent agreement of 1894, make it plain that the provisions of the original treaty of 1863 relied upon as creating the tax exemption here claimed, were superseded by the provisions of the general allotment act.

The rights of the Nez Perce Indians with respect to the lands allotted to them, are thus determined by the general allotment act of 1887 and as that act contains no provisions exempting the allotted lands from taxation after issuance of fee simple patents upon expiration of the trust period. I am clearly of the opinion that such lands thereupon become subject to the taxing power of the State.

Approved:

Jos. M. Dixon,
*First Assistant Secretary.*